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Supreme Court of the United States

OCTOBER TERM, 1963

No. 885

JOHN E. PARKS, JR. and ROBERT M. FOOTE and ALBERT McHUGH and PAUL ZIEGLER and SILVIO STAMERRO, Individually and as representatives of the Members of Local 28, IBEW, in a class action and LOCAL UNION 28, IBEW,

Petitioners,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS and LOCAL UNION NO. 24 (IBEW),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT IBEW'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent IBEW is "dissatisfied", under Rule 40, para. 3, with petitioners' statement of eleven "Questions Presented", and each of them,—all of them as to substance, and Questions numbered 1, 2, 3, 5 and 6 as to both substance and form, because these latter are loaded with erroneous factual assumptions. Respondent is dissatisfied particularly with the unsupported assumptions of evidentiary and ultimate facts (and of non-existent "findings of fact") chosen as the basis of these five, which are themselves involved fact Questions.

Petitioners lost their case purely on *the facts*[1] and be-

[1] Throughout the brief emphasis is supplied, except where otherwise noted.

cause of failure of their proof, and not on the law. The two lower Courts decided in petitioners' favor every question of jurisdiction (four such questions—listed as "Additional Questions" Nos. 8-11, inclusive, in the Petition) that was necessary to empower the Courts to give petitioners all the relief they requested, i.e. plenary relief (if they were entitled to any relief whatsoever on the facts).[2] The Courts permitted in evidence all of the evidence—"a great mass" —offered by the petitioners, all of respondent's objections to admissibility being overruled. (Jt. App. 14).[3] Furthermore, all the other principal and controlling questions of law in the case (including the availability and interpretation of all federal statutes invoked by petitioners) were also decided in favor of petitioners both by the Court of Appeals and the District Court.

The Court of Appeals, however, after months of careful consideration, drew, and reached in favor of respondent, the proper ultimate *factual conclusions* entitling respondent to a judgment when the law as to which both Courts were agreed was applied, i.e. the Court of Appeals recognized the ultimate facts which logically and inevitably flowed from the evidentiary facts which had been found by the District Court, all of which evidentiary fact findings the Court of Appeals first accepted.

There are no Questions that have been, or could be, presented by petitioners in this case of the character that might warrant the granting of the writ of certiorari *at the instance of petitioners*. See Rule 19. This is so primarily because (a) all important and controlling questions of law have been decided in petitioners' favor, and (b) all the other Questions Presented, however phrased, are questions of complex fact.

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[2] Both Courts concluded *on the facts* that there was no "trusteeship" involved in the revocation of petitioners' charter, and hence no jurisdiction under Sec. 304 of the Landrum-Griffin Act. But no relief could have been granted under that jurisdictional provision which could not have been granted petitioners under the jurisdiction which was assumed. Hence, Question Presented No. 4 seeks to raise questions of fact and law which are academic.

[3] As in the petition, reference in this brief to "Jt. App." is to the joint appendix and to "App." is to the appendix attached to the petition.

Yet petitioners directly invite this Court to re-examine a host of purely factual questions and then, in aid of this objective, also invite this Court, by their "Additional Questions," numbered 8-11, inclusive, to re-affirm the legal victories they have already won in the fields of federal jurisdiction and of the construction and applicability of federal statutes, and the like. These questions of jurisdiction and applicable law (all moot and purely academic now from the viewpoint of petitioners and of this Court) are presented by petitioners, certainly not to obtain their reversal, but solely as a device for obtaining permission to re-argue before this Court the numerous questions of evidentiary fact, and of ultimate factual conclusions, in this case, to which the lower Courts gave the most time-consuming and painstaking consideration.[4]

As illustrative of the factual Questions Presented that are clearly inaccurate and defective as to form, let us briefly examine here the form and content of petitioners' "Questions Presented No. 1."

Petitioners' Question 1 mentions Section 501(a) of the Landrum-Griffin Act, but it raises no legal question of that statute's interpretation or availability to petitioners. Instead Question 1 represents a jumbled package of 9 selected factual questions, the first 7 of which, as they are stated by petitioners, were not decided in petitioners' favor by either Court. They are:

(a) Was Local 28 "forced" to strike?

(No provocation for the strike emanating from IBEW was attempted to be proved or found.)

(b) Did the IP make a "secret deal with the employers"?

(This is an allusion to a so-called "tentative decision" of the Council on Industrial Relations, denied by respondent, but found by the District Court. It was "secret" only in the sense that all tentative deliberations of the Council in camera are always confidential, none of them being dis-

[4] Trial in the District Court consumed 22 days. The Court of Appeals held the case *sub curia* for over 6 months.

closed to anyone except the final action of the Council at the close of its sessions (App. 10, Jt. App. 23). It was not found by the District Court to have been a "deal," or even made known to the Baltimore "employers" (Jt. App. 23).)

(c) Was Local 28 "forced" to strike "because the IP . . . [made] a secret deal with the employers"?

(d) Did the IP make "a secret deal with the employers", "while professing his support of the local"?

(e) Did the IP profess "his support to the local in the local's collective bargaining" (i.e. the local's inflexible demand for an "unrealistic" 35-cent wage increase (Jt. App. 24, 25; App. 16) and for an "abrogation", not consented to, of its existing agreement (Jt. App. 38)), and, if so, what was the extent of the support so professed?

(The District Court merely found, "The Local reasonably felt that it had the support of the International in its efforts to obtain *a substantial increase* (Jt. App. 20). If this is true, (see App. 17), it is far from saying that the IBEW or the IP ever professed to support the Local in "shooting for the moon" for 35 cents (App. 18), in its "abrogation" of its collective bargaining agreement, "not sanctioned by the IP" (Jt. App. 38), or in spurning the services of the Council (App. 20, Jt. App. 26).)

(f) If the IP made a "secret deal with the employers", did it "destroy any chance of the Local to bargain a fair agreement"?

(This is again an allusion to the so-called "tentative decision" of the Council in its deliberations in May 1961. It suggested a 10-cent wage increase but required no "evergreen" Council clause (App. 20). It "destroyed" nothing, never being communicated to the Baltimore employers and being superseded by the Council itself two weeks later (App. 20). A month later the employers offered Local 28 double this amount (Jt. App. 538, 539, 930). This 20-cent increase was as great as that which Local 24 later obtained (Jt. App. 31).)

(g) Had the Local's leaders "successfully sued the International under Landrum-Griffin"?

(This is a distorted reference to an action brought in April 1960 to terminate a trusteeship of Local 28, which trusteeship obtained from February 1959 to August 1960, when the IP terminated it at the end of the 18-month period provided in Landrum-Griffin. The suit, with which the IP had no personal connection, was never tried, but was mooted and had no "success" or consequences whatever (App. 14).)

(h) If "one" of the IP's reasons for revoking Local 28's charter was a desire to punish the members of the local because of their leaders' "successful litigation", was it important in view of the other and more important reasons and grounds justifying the revocation?

(The District Court found a number of other most compelling reasons for the revocation. It found Local 28's unauthorized strike "a serious offense, justifying expulsion" (Jt. App. 36); "that the IP owed a duty to the union as a whole, and could not properly grant permission to one local to engage in a strike which he felt to be contrary to the best interests of the IBEW" (Jt. App. 38); that the IP acted "to maintain *necessary* union discipline" (App. 34); and that the IP was not motivated by "ill will" or "express or particular malice" (Jt. App. 38).)

(i) Did the Fourth Circuit err in "concluding", as a matter of ultimate fact, "on the evidentiary facts found by both Courts" (which of course included a host of controlling facts found by them adversely to Local 28 but not even alluded to in this question), that the IP did not violate his fiduciary duty in revoking the charter of Local 28?

If it is appropriate at all for petitioners to ask this Court to re-examine (a) the legal questions which petitioners won, and (b) the purely factual issues which petitioners lost, in this long and complex trial (which we emphatically deny), petitioners' Questions Presented Nos. 1, 2, 3, 5 and 6, must,

at the very least, be recast to eliminate erroneous slanting,[5] and to read as follows:

1. Whether the Court of Appeals erred in concluding as a matter of ultimate fact, on all the relevant circumstances proved in the case, including the evidentiary facts found by both Courts, that *the International President (IP) of the IBEW did not violate his fiduciary duty to the members of Local 28* under Section 501(a) of the Landrum-Griffin Act, in revoking the charter of Local 28, (a) for its flagrant breach of contract in engaging in a strike without obtaining his consent, when such consent was expressly required by the IBEW Constitution, and (b) for defiantly refusing to end the strike, notwithstanding repeated protests, reason-

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[5] If certiorari should be granted, notwithstanding respondent's opposition to this petition, respondent, in its defense, would expect to argue its side of all the questions attempted to be presented by petitioners, including the jurisdictional questions, and, in addition, respondent reserves and would desire to argue four additional questions, which are:

(1) Whether the action of the International Executive Council (IEC) of the IBEW (after hearing all of the additional evidence which petitioners desired to offer upon the question of the IP's good faith in conducting the revocation proceedings and in revoking Local 28's charter, including depositions of the IP and others taken after the hearing before the IP), in affirming the charter revocation and in finding expressly "that the IP conducted himself properly is beyond question" (App. 803), conclusively determined the validity of the IP's action. The IEC, being the parties' chosen instrument, if its decision is enforceable under § 301 of Taft-Hartley, "it is of course not open to the courts to reweigh the merits of the grievance". (*See General Drivers, Warehousemen and Helpers, Local Union No. 89* v. *Riss & Company, Inc.*, Oct. Term, 1962, decided Mar. 18, 1963; *United Steel Workers* v. *American Mfg. Co.*, 363 U. S. 564, 567-8);

(2) Whether petitioners were barred from relief by failure to take and exhaust their intra-union remedies;

(3) Whether petitioners were barred from relief by their unclean hands. (The District Court found that the hands of Local 28's leaders, by reason of their breach of contract and other misconduct, were unclean, but erroneously refused, notwithstanding the common law of agency and the Federal statutes 29 U.S.C., Secs. 152(13), 185(b), 185(e) (see Appendix to this brief, pp. 1, 2), to attribute such unclean hands to Local 28 and its members, who, nevertheless, had consciously and knowingly authorized and ratified their leaders' actions. The Court of Appeals reversed the District Court on other grounds, so it was not necessary for it to determine this question); and

(4) Whether, if there was any infirmity in the revocation procedure followed, the respondent, to uphold the integrity of its organization, is still free, as the Court of Appeals held (App. 78, Ft. 86), to conduct a retrial of Local 28 for its unauthorized strike, which strike is still continuing.

ings and warnings from the IP over a period of months to each of the officers and members?

2. Whether the Court of Appeals erred in concluding as a matter of ultimate fact, on all the relevant circumstances proved in the case, including the evidentiary facts found by both Courts (and the findings of the District Court that the IP acted "to maintain *necessary* union discipline" and without "ill will" or "express malice"), that *the IP had sufficient proper objectives* in bringing revocation proceedings against Local 28?

3. Whether the Court of Appeals erred in concluding as a matter of ultimate fact, on all the relevant circumstances proved in the case, including the evidentiary facts found by both Courts, that the three hearings accorded Local 28 (i.e. (1) before the "fair and impartial" Referee, (2) before the IP, and (3) before the completely "unbiased" International Executive Council (IEC),[6] (each of which hearings fully complied with the IBEW Constitution), were "full and fair", and therefore valid under Sections 101(a)(5) and 609 of the Landrum-Griffin Act?

4. (Relates to alleged "trusteeship".)

5. Whether both Courts erred in not making additional findings, although not requested by petitioners to do so,[7] expressly *applying the label of "unfair labor practices"* (or in not expressly stating that such characterization was inapplicable) to the conduct of (a) the union or (b) the employers, in their collective bargaining negotiations prior to Local 28's unauthorized strike, (which conduct, however, was fully disclosed by the evidence and considered and

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[6] The Court of Appeals noted (App. 33) that "the IEC was found to be unbiased". The District Court found the fact-finding Referee to be "fair and impartial". (App. 50.)

[7] With regard to Question Presented No. 5, Petitioners did not suggest such a finding in their elaborate "Request for Findings" made to the District Court. Furthermore, in the Court of Appeals they defended, and praised as "careful", the failure of the District Court to make this finding, arguing that, since all the evidence bearing on the IP's conduct and motivation was admitted, the failure so to characterize it was not "crucial" (Petitioners' brief, pp. 76-77).

weighed by both Courts as it bore on the issues of this case)?

6. Whether both Courts erred in concluding as a matter of ultimate fact, on all the relevant circumstances proved in the case, including the evidentiary facts found by both Courts as to the numerous instances of misconduct of the leaders listed by the District Court, and the concession of the petitioners[5] (Jt. App. 384-5) that the IP "had no personal malice toward the individuals" in Local 28, that the IP, in refusing to consent to Local 28's strike, *did not violate his fiduciary duty to these leaders of Local 28*, or have bad faith and illegal purposes toward *these leaders*, and that, if such conclusions of both Courts were in error, *these leaders*[8] of Local 28 should be perpetually immune from all disciplinary action for their part in fomenting and continuing the unauthorized strike?[9]

7. (Relates to denial of damages and counsel fees.)

8.—11 (Relate to questions of jurisdiction and substantive law decided in favor of petitioners.)

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[8] Notwithstanding the revocation of Local 28's charter in August 1961, the membership in IBEW of the rank and file members of Local 28, with all its attendant benefits, including participation in the International's pension and other funds, has been continued to date, and those members have been free to transfer their local membership to other IBEW locals, including Local 24 in Baltimore, and hundreds of them have done so. Furthermore, respondent has not attempted to touch Local 28's own pension or other funds, the investment of each member of Local 28 therein having been fully preserved. The disciplinary proceedings against 15 officers and ringleaders of Local 28 for their individual part in the unauthorized strike were not a part of the present civil actions. Such disciplinary proceedings were *separately* instituted before the IEC, which imposed appropriate discipline against these leaders, and its decisions have been duly affirmed on appeal by the International Convention, which met in September 1962. The prosecution of these separate disciplinary proceedings against the leaders, and the enforcement of reasonable discipline which might be legally imposed, "including expulsion", was expressly permitted by the decree of the District Court (Jt. App. 49).

[9] As we have seen, the District Court found the hands of these leaders to be unclean. No challenge is made by petitioners to the numerous findings of fact as to their bad conduct on which this conclusion rests. There is no possible ground for this Court even to consider Question Presented No. 6 upon whether these "reckless" leaders (Jt. App. 43) shall be awarded perpetual immunity.

STATUTES INVOLVED AND ADDENDUM TO FOURTH CIRCUIT'S OPINION

The pertinent statutes involved not set forth in the petition are printed in Appendix to this brief, and are as follows:

National Labor Relations Act (NLRA)

§ 2(13), 29 U.S.C. § 152(13), App. to this brief p. 1.

§ 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A), App. to this brief, p. 1.

Labor Management Relations Act (LMRA)

§ 201(a)(6), 29 U.S.C. § 171(a)(6), App. to this brief p. 1.

§ 301(b), 29 U.S.C. § 185(b), App. to this brief p. 2.

§ 301(e), 29 U.S.C. § 185(e), App. to this brief p. 2.

Labor Management Reporting and Disclosure Act (LMRDA)

§ 3(o), 29 U.S.C. § 402(o), App. to this brief p. 2.

§ 101(a)(1), 29 U.S.C. § 411(a)(1), App. to this brief p. 2.

§ 101(a)(2), 29 U.S.C. § 411(a)(2), App. to this brief pp. 2-3.

In the appendix to this brief is printed an additional paragraph of the Opinion of the Court of Appeals, which was issued later and hence not included in the appendix to the petition. It should be read as if inserted as the first full paragraph on App. 38 of the petition.

STATEMENT OF THE CASE

The District Court's Decision and Fact Findings

Respondent is dissatisfied with petitioners' description of the action of the District Court, mainly (1) because it claims that the Court found "bad faith" on the part of the IP, which is contrary to fact,[10] and (2) because the description sets out some of the factual conclusions which were favor-

[10] The District Court found that the IP, in revoking the charter, had "mixed motives", many of them worthy ones to enforce "necessary" discipline, but also including "anger" at the institution of suits by a few of Local 28's members many months previously, and, therefore, a "breach of fiduciary duty", but nowhere in its opinion did it find "bad faith" on the part of the IP. That is petitioners' characterization.

able to petitioners but omits to mention the many more controlling evidentiary facts which the District Court found against petitioners. An assembly of direct quotations of such findings which are scattered throughout the District Court's opinion will supply the omissions and also serve as respondent's *Statement of Facts*, correcting many erroneous statements in petitioners' present statement. With only a few suggested "amplifications" and "modifications", petitioners "adopted" in their brief in the Court of Appeals (p.2) the entire statement of facts made by the District Court,—necessarily including these quotations as well. In selecting only the quotations in respondent's favor to arrange them in logical sequence, we have had to remove some of them from their context, but that has not distorted them, because each of them, separately considered, is an independent valid finding. We quote as follows from the District Court's opinion:

(a) The merits and fairness of the Council on Industrial Relations (CIR)

The IBEW Constitution provides, "'The IP has the right to correct any by-laws, amendments, rules or agreements [of any local] to conform to this Constitution *and the policies of the IBEW.*'" (Jt. Ap. 16). "• • • the *policies* which *shall* be followed by the officers are matters *for the union as a whole* to decide, subject to the restraints imposed by law" (Jt. App. 40). "The 1958 International Convention refused to eliminate *the reference to 'policies'*" (Jt. App. 16).

"For many years it has been *a policy of the IBEW to discourage strikes*, and to encourage its locals to include in their collective bargaining agreements with local chapters of NECA a 'Council clause', requiring the parties to submit to the Council on Industrial Relations • • •, a bipartite group set up by IBEW and NECA, all disputes between the local and the chapter (Jt. App. 16). "The Council • • • *is a part of the collective bargaining process at a higher level* • • •." "• • • *most of the locals* have in their agreements clauses requiring the submission to the Council not only of disputes about working conditions and the like during the term of the agreement, *but also proposed changes in wages*

and working conditions at the end of any contract year, if the local labor-management committee is unable to reach an agreement". " * * * it was *generally* but not universally, *believed that such agreements were 'evergreen' contracts*, i.e. perpetual agreements terminable only by mutual agreement, by permission of the Council, or by the possible dissolution of the Council by IBEW and NECA" (Jt. App. 16-17).[11] "I stated that it is *highly desirable* that the local unions of IBEW and the chapters of NECA take advantage of the services of the Council; the evidence shows that *it has served all parties well over the* years. I adhere to the view that the Council has served parties well over the years. *Wages have steadily increased*, in line with other comparable building trades, *and there have been remarkably few strikes.*" "The IBEW Constitution * * * contains provisions which appear to authorize the control over the affairs of the local unions exercised by the IP" (Jt. App. 40). "In 1958, 1959, and 1960 the Local and the Chapter submitted wage disputes to the Council, which granted an *increase in each instance* [12] not as large as the Local wanted, but *not unfair or unreasonable under all the circumstances*, including the wage rates of comparable building trades in Baltimore, *where unions are not as strong* as in Philadelphia, Wilmington and Washington" (Jt. App. 19-20).

(b) The unreasonableness of Local 28's so-called collective bargaining in 1961.

During the entire five months of collective bargaining in 1961, Local 28, without deviation, "*demanded* 35c hourly wage increase for the first year and sought comparable amounts for the two years thereafter" (Jt. App. 20). This was a "*continued demand* for 35c for the first year". "The leaders of Local 28 were *determined to strike* if they could not obtain their *demands* by negotiation" (Jt. App. 24).

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[11] Of approximately 800 working agreements involving members of NECA, some 90% (in excess of 720) contain a council clause in one form or another generally believed to be "evergreen" (App. 11, Jt. App. 135).

[12] The Court of Appeals found that the Council "granted Local 28 hourly wage increases of 15c, 17½c and 10c in these three years, respectively", and that their fairness was not "contested" (App. 15).

"Such an increase * * * may have been *unrealistic* in view of the *strong non-union situation* in Baltimore" (Jt. App. 25). "International Representative Adams told them [i.e. Local 28] in April that they were 'shooting for the moon.'" (Jt. App. 20).

(c) The IP's proper and normal relations with NECA, the ineffectivenesss of the so-called "tentative decision" of the Council, and the IP's failure to insist that Local 28 accept the "evergreen" Council clause.

"As this Court has pointed out on a number of occasions, the officers of the Internationl and of NECA have a *common interest* in the Council as a means of stabilizing labor relations in the industry, which renders *a large measure of cooperation* between the two national organizations *reasonable and desirable*[13] (Jt. App. 21). "In the case at bar Local 28 has *failed to prove* that news of the 10c tentative decision [of the Council on May 15] was communicated to the Maryland Chapter [the Baltimore employers]. * * *" (Jt. App. 23). "On June 2 [two weeks later] the Council, through its executive committee, filed a 'Decision', stating that in view of the pending litigation, *no decision should be issued*" (Jt. App. 23).

"Plaintiffs *contend* that the act of the IP [i.e. August revocation proceedings] was taken in furtherance of his effort to require Local 28 to include the yellow sheet 'evergreen' Council clause in its agreement with NECA, and was therefore illegal. In the first place, there is *some doubt* whether, *after* the decision of the Court in May and the dismissal of the appeal in *June*, the IP really *intended to require* that the yellow sheet clause be included in the agreement. It was *eliminated* from the agreements signed by Local 24 and by the Washington, D. C. local, perhaps because the IP regarded the leadership of those unions differ-

[13] The Court of Appeals found: "For years NECA and IBEW have conferred on a national level to further their common interest in stabilizing labor relations in the electrical construction industry" (App. 6), and "The International was dealing day by day with many chapters of NECA and the International's relations with NECA were important to the welfare of all 150,000 who worked in the construction industry" (App. 36).

ently, and perhaps because of legal advice he received during the summer and early fall" (Jt. App. 39).

(d) Local 28's first violation of the IBEW Constitution by abrogating its collective bargaining agreement.

The contract of the parties, "the IBEW Constitution, provides * * * 'No agreement of any kind or nature shall be abrogated without sanction of the IP.' *The abrogation of the agreement* * * * between Local 28 and the Maryland Chapter [i.e. Local 28's termination on March 31, 1961 of its collective bargaining agreement] *was not sanctioned by the IP*" (Jt. App. 38).

(e) Local 28's second and third violations of the IBEW Constitution by its two unauthorized strikes.

The IBEW Constitution also, by the "*plain meaning* of the words", required Local 28 to obtain the IP's consent to its strikes. "Moreover, * * the IBEW Constitution * * * permitted an appeal to the IEC from the decision of the IP that this was a strike or work stoppage which required his consent and *no such appeal was taken by Local 28*" (Jt. App. 33). Such consent requirements "are *common* in the building trades and other industries" (Jt. App. 32).

Local 28 in 1961 engaged in *two* unauthorized strikes, the first, which lasted for several weeks in April and May, "the attorneys for Local 28 describe * * * * as a wildcat strike but I find it was *subject to the control* * * * of the president and business manager of Local 28 and O'Doherty, its attorney, who more and more assumed the leadership and direction of the Local."[14] "Local 28 had not asked for nor received permission to strike from the IP" (Jt. App. 21).

Local 28's second unauthorized strike began in June, "the business manager * * * stating *falsely* that the Local had been given a 'green light' " from the IP, and has continued to date (Jt. App. 24). When advised of this second strike,

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[14] The Court of Appeals has pointed out, "Other than to note its surprise, the Local makes no effort to contest this finding, except to point out that the finding was not that the strike was *caused* by the Local's leadership" (App. 19, ft. 13).

"the IP *promptly* replied by telegram on June 15 that *any strike without his consent would be in violation of the IBEW Constitution*, and that he *was refusing his consent* in this case" (Jt. App. 25). "The telegram was received by the executive board of Local 28 *before the strike began*, but it was not brought to the attention of the members of the Local" (Jt. App. 26). "On June 20 • • • the officers of the Local agreed [with the IP] that a meeting of the Local would be held on June 22, and that the IP's telegram of June 15 would be read to the membership. This was done • • • " (Jt. App. 26).[15] "The IP owed a duty to the *union as a whole*, and *could not properly grant permission* to one local to engage in a strike which he felt to be contrary to the best interests of the IBEW • • • (Jt. App. 38).

"• • • engaging in a strike without the consent of the IP is a *serious offense, justifying expulsion*", and, it "is, of course, a serious breach of discipline, for which a member may be expelled,[16] *or a charter be revoked*, after a fair hearing" (Jt. App. 36, 37). The "local union • • • flout[ed] the Constitution and policies of the International and still claim[ed] the rights and privileges of membership therein" (Jt. App. 40). The members of Local 28 "followed *the reckless leadership* of their officers". "• • • the local's stubborn insistence in *striking in defiance of the IBEW Constitution* without appealing from the action of the IP, in refusing his consent to the strike, might be sufficient to bar relief, if we were dealing only with the rights of the leaders and officers of the Local" (Jt. App. 43). "Under all the circumstances it would be *unjust and unreasonable to allow damages* to the Local". "Nor should any counsel fee be allowed to plaintiffs against IBEW in either case". "In view of the

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[15] The Local's attorney "disagreed with the I.P.'s construction of the Constitution" and the members unanimously gave a "vote of non-concurrence" with the I.P.'s decision (Jt. App. 26-27). The Local did not appeal from the I.P.'s decision to the I.E.C. nor comply with the I.P.'s decision pending appeal in violation of the requirements of the IBEW Constitution (IV, 3(2), XVII, 13, XXVII, 16; Jt. App. 61, 67, 71).

[16] Such power of expulsion is given *express* recognition both by the Taft-Hartley Act and the Landrum-Griffin Act. 29 U.S.C. §§ 158(b)(1)(A); 402(o) (See Appendix to this brief, pp. 1, 2).

part played by the attorney for Local 28 in the events leading up to the strike and immedately thereafter * * * the decree will provide that no fee be paid to any attorney *out of the funds of Local 28* without approval of the Court" (Jt. App. 45). This attorney misled the membership of Local 28 with "unsound legal opinions, frequently reiterated" (Jt. App. 43).[17]

"The decree will not prevent the proper officials of the IBEW from pressing the charges they have heretofore filed against such individuals, [i.e. against the leaders of Local 28 for their part in the strike] before any tribunal, nor from enforcing any reasonable punishment, *including expulsion*, which may be legally imposed" (Jt. App. 45, 46). "This decision does not mean that Local 28 may *continue with impunity* to flout the Constitution and policies of the IBEW". Local 28 must observe the IBEW Constitution, "if Local 28 wishes to continue as a part of that union" (Jt. App. 46).

(f) The situation during the 6-week period from the start of the June strike to the charter revocation.

On June 20, Local 28's leaders told the IP that "Local 28 [had] entered into *interim* agreements with a dozen or so contractors * * * providing for a wage increase of 35c" but requiring the Local "*to reimburse the contractor for the differences* between the 35c an hour paid under the contract and the wage ultimately agreed upon between the Local and the Maryland Chapter" (Jt. App. 26). "The IP stated that he wished them well in their negotiations, but that he wanted any unresolved *issues* to be submitted to the Council. He refused to consent to the strike * * *" (Jt. App. 26). On July 12, the IP told them "that the only way Local 28 *could avoid* disciplinary proceedings would be to return its members to work and submit all unresolved issues to the Council" (Jt. App. 28). As of this time, there is "doubt"

[17] In view of these unchallenged findings as to the attorney's conduct in these matters and in leading and directing the first and second unauthorized strikes, suggesting, by Question Presented No. 7, review of the District Court's disallowance of counsel fees is sheer audacity.

that "the IP really intended to require that the yellow sheet clause be included in the agreement." (Jt. App. 39). "The hearings before the referee were held on July 17-21. He made a prompt report to the IP, before whom an oral argument was held on July 28"[18] (Jt. App. 28). "No doubt the referee Schedler was a fair and impartial man * * *" (Jt. App. 35). "On August 1 the IP issued a Decision and Order, revoking the Local's charter *unless the Local returned its men to work by August 7* * * *"[19] (Jt. App. 28). "On August 5 the members of the Local voted to support its officers 991 to 2" (Jt. App. 29). "There was *no sufficient evidence* that the IP was moved by what is sometimes called *express or particular malice*, i.e. ill-will, spite, a grudge, or a desire to be revenged on a particular person or persons, resulting in a deliberate intention to commit an injury" (Jt. App. 38). One reason for his action was "to maintain *necessary* union discipline"[20] (Jt. App. 37).

(g) The hearing before the IEC.

"On September 12 the IEC heard argument on the appeal of Local 28 * * *". "Although apparently under the IBEW Constitution it might have refused to entertain the appeal because Local 28 had not complied with the order from which the appeal was taken" (Jt. App. 30). "* * * the attorney for Local 28 was allowed to read [in the hearing before the IEC] from the depositions of the IP and other

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[18] The Court of Appeals found: "On July 25, the referee reported his findings to the IP that the Local had gone out on strike on July 19 and continued the strike without requesting or receiving consent of the IP, that this was a work stoppage requiring the IP's permission, that by his telegram of June 15 the IP had refused his consent, and that this fact was known in sufficient time to have cancelled the strike" (App. 26-27).

[19] The Court of Appeals found that: "Copies of the order were mailed to all members of Local 28, with a letter from Freeman explaining the action that must be taken to comply, and the consequences to the Local and its members of failure to comply" (App. 27). The Court of Appeals also found "Severe measures were taken against the Local, but only after full opportunity had been given the strikers, first to comply with the IP's back-to-work order and later, *in the revocation decision itself*, to redeem themselves" (App. 36).

[20] The Court of Appeals found: "the District Court found that the IP had been motivated in part by a legitimate desire to discipline the Local, its members and officers, for having engaged in an unauthorized strike *even after his repeated orders to return to work*" (App. 34).

witnesses which had been taken for use in the *Parks* case [21] and to challenge the good faith and impartiality of the IP and the members of the IEC in the course of his intemperate and ill-advised argument" (Jt. App. 36). "* * * on September 30 [the IEC] affirmed the order of the IP" (Jt. App. 30).

(h) None of the court actions brought by certain members of Local 28 while it was in trusteeship in 1959 and 1960 involved the IP personally or was important or successful.

None of these three suits was ever tried and they were all mooted months before Local 28's first unauthorized strike in April 1961, with a long period of cordial relations in between. Neither the IP nor Local 28 was a party to these suits or participated in them in any way. They were each instituted by six or seven members of the Local. As to the first of these actions, instituted in 1959, against the Trustee and the local's accountant to enjoin a referendum proposed to the local's membership by the Trustee, the District Court said: "After attempting to have the referendum withdrawn, but without exhausting their intra-union remedies, some of the members of Local 28 filed an action in this Court to block the proposal which had received the largest number of votes. Most of the members had abstained from voting, *so the IP refused* to put the proposal into effect, and the court action was dismissed by stipulation" (Jt. App. 18).

As to the second action, instituted in early 1960, against the IBEW, the Trustee and the local's treasurer, to set aside the trusteeship, the District Court said: "* * * the trusteeship was terminated by order of the IP dated June 30, effective August 5 [1960]" (Jt. App. 19).

As to the third action also instituted early in 1960, against

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[21] The Court of Appeals found that these depositions were "with respect to the IP's good faith in revoking the charter" (App. 28). Under the IBEW Constitution the IEC was authorized to hear and consider this *additional* evidence not in the record before the IP. Only in *second appeals* (as contrasted with appeals to the IEC from *original* action of the IP in which additional evidence can be offered) is the tribunal confined to the evidence submitted in the original *case of appeal* (Jt. App. 72).

the Trustee and the IEC to enjoin disciplinary measures against the plaintiff members for violating the IBEW Constitution, the District Court said: "The charges against Eveson et al. were heard by the IEC on June 17, 1960, * * * and the IEC disposed of the charges with a finding of mitigating circumstances. The actions in this Court, *having become moot*, were closed out in December 1960. From August 1960 until March 1961 the relations between Local 28 and the International officers were apparently friendly" [22] (Jt. App. 19).

(i) Other important facts found by the District Court during hearings.

On May 11, 1961, when it announced its decision in the action brought by Local 28 against the Maryland Chapter to abrogate its collective bargaining agreement (194 F. Supp. 494), the District Court, in the presence of several hundred Local 28 members, warned Local 28 and its members, in emphatic terms, that "If you refuse to go ahead with this policy the International has set up and which all of the other locals go along with [i.e. submission of unresolved disputes for bargaining before the Council], and strike, the International would *very likely* revoke your charter with whatever loss there is", and that the legal effect "may be severe". The Court further said, "I think you then can't expect to come to the Court and ask for protection against the International, *if you terminate and strike*" (Jt. App. 845-6), (App. 53).

During the trial of the present cases, when the plaintiffs had completed over 80% of their case-in-chief, the District Court ruled that they had offered no evidence of collusion or conspiracy between respondent and NECA. The validity of the ruling was never later impaired. The Court said:

"You have certainly proved that they [IBEW and

[22] During this period there were a number of instances of cooperation between the two unions and their officers and Local 28's business manager testified that he and respondent were then "working together * * * with no problems at all", and that he had "a feeling that we were one of each other" (Jt. App. 331). The Court of Appeals also found "There is no evidence of further difficulties between the International and Local 28 from August, 1960, to March, 1961" (App. 14).

> NECA] had a common desire and interest in having the council clause in all of the contracts, but that is not, I do not conceive that that is illegal or that it amounts to conspiracy or anything improper, if they tried to accomplish a result which they honestly believed to be good. * * * But letting it [the evidence] in, subject to exception as I am doing, does not mean that I think you come within a mile of proving up to this time a conspiracy between IBEW and NECA to have the charter of Local 28 revoked. There has not been the slightest suggestion of that in the evidence" (Jt. App. 315). "* * * I have not got a shred of evidence that there was any effort on the part of NECA, either nationally or locally, to have the 28 charter revoked, or that that has been suggested to them by anyone. * * * The only thing that is before me, if there is any conspiracy between the International Union and NECA, that NECA did not bargain in good faith, and I say that you have not proved--you have not offered any evidence, in my opinion, legally sufficient to prove that yet" (Ja. App. 316).

In its opinion in the present cases, the District Court said, "On August 4, in the suit which Local 28 had filed in this Court on July 17, the Local filed a motion for a temporary restraining order to block the operation of the August 1 Decision and Order of the IP [the revocation order] * * *. A hearing was held before me on August 8 * * *. On August 14, this Court filed its opinion, 197 F. Supp. 99, refusing to issue a preliminary injunction and dismissing the complaint without prejudice. The opinion * * * concluded that this Court should not entertain the case until the IEC had been given an opportunity to decide the appeal which Local 28 had theretofore taken. The Court found that *no denial of procedural due process*, by the referee or the president had been shown *by any fact alleged* or presented to the Court at that time, 197 F. Supp. at 108". **(Jt. App. 29).**

In this connection it should be noted that in the argument before the District Court on August 8, in 197 F. Supp. 99, the facts were *fully disclosed* to the Court that the IP had not only preferred the charges in the revocation proceedings but had decided the case. On those allegations, the Court

said on August 14 that the charge that due process was lacking was "answered by the admitted facts", and, further, that "the propriety of the action of the president can be and presumably will be decided by the appropriate union tribunal" [23] (197 F. Supp. at pp. 107, 108).

In the present case, at the hearing on a motion to dismiss the suit brought by Local 28's *members*, the District Court, on the subject of the complicity of the rank and file members, stated: "• • • but none of these men [the members] have alleged that they *protested* the action taken by the local union. I take it that all of these members went along with the action; if the action of the local union was contrary to the Constitution, *they did it with their eyes open*, and must suffer the penalties which may properly be imposed upon them under the Union Constitution • • •. But these men are not people who are really caught in the middle; *they are essentially the local union*. The allegations I have made [read] is that all but two or three of the local union members voted to support leaders of the local in defying the International President [24] • • •" (Jt. App. 880).

(j) Some additional errors in petitioners' statement of facts

The above collection of District Court findings will correct many of petitioners' erroneous statements. Among others that need to stand corrected, however, are the following:

1. The repeated, over-protesting claims in the petition that Local 28's "defense" in the revocation hearings before the IP was "based on the impropriety of his own conduct in the matter out of which the charges arose" (p. 3); that "the Local called upon the IP to be a witness, among other

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[23] That issue was, of course, decided by the IEC and the propriety of the IP's conduct and action was fully upheld (Jt. App. 803).

[24] The Court of Appeals also held: "The general membership cannot *on this record* be cast in the role of blameless victims. • • • it is undisputed that when they later learned the truth they supported these leaders willingly enough in flouting the International. This they did in disregard of the District Judge's clear caution given May 11, 1961, in open court in the presence of several hundred members and despite three personal letters from the IP sent to each member" (App. 53).

things, concerning * * * 'the propriety of his own actions and his own good faith and motives'" (p. 18); and that the IP "refused to testify when the propriety of his own conduct was called into question and his testimony was vital to the Local's defense" (pp. 26-7); that the IP "refused to appear as a witness although his testimony was vital to the defense" (p. 32); that the IP failed "to submit himself as a witness to the Local, whose defense was based on calling into question the propriety of his conduct" (p. 32), are *simply contrary to conceded fact*. It was a *concessum* by Local 28 that the charge of bad faith on the part of the IP was first made toward the close of the hearing before him on July 28, long after the hearing before the referee and the referee's findings, and only three days before the revocation order itself. It was also a *concessum* that Local 28 made no proffer of what, if anything, it expected to prove by the IP's testimony. It was also conceded by petitioners in their answers to interrogatories that, at the time the revocation proceedings began, they had no information or knowledge of the many things which they later claimed to have discovered by the taking of depositions and which they alleged, and attempted, without success, to prove, against the IP in the later hearing before the IEC (Jt.-App. 97-8).

During the trial, the District Court expressly recognized, based on these concessions of counsel, that Local 28 (a) made no proffer of the IP's testimony and (b) did not raise any question of the IP's good faith until July 28, 1961, *near the very close of the revocation proceedings*. The colloquy was as follows:

> "(The Court) While we are on the question, did Mr. O'Doherty [attorney for Local 28] make any proffer as to what he undertook to prove by Mr. Freeman [the IP]? * * * Was this a fishing expedition, or did he make a proffer of what he intended to prove?
>
> (Mr. Sykes, attorney for Local 28) There is no provision for a formal proffer. He did not make a formal proffer of what he intended to prove * * *.
>
> (The Court) * * * I haven't seen any charge of bad faith up to that time * * *.

(Mr. Sykes) I might say on that, your Honor, that the charge was made in its crystal form in the argument before the IP sometime *late in July*, but the reason for that is that *we did not know* about this and about the connection with NECA and the whole business, the meetings and what-not, and the fact that *the defendant was successful in concealing* these things from us up to a certain point shouldn't be used as an argument for denying us the right to make a claim."

(The Court) • • • I see nothing at this point except that Mr. O'Doherty was fishing. • • • Mr. O'Doherty didn't even request, so far as I could see, that the matter be shifted to the Council [IEC] • • •" (App. 255).

It is also highly important to realize that in neither Local 28's first complaint (Jt. App. 821-831) filed in the District Court on July 17, during the revocation proceedings, nor in its motion for temporary injunction, filed August 4, after the revocation order was issued, were the IP's good faith and propriety of his conduct drawn in question.

Furthermore, in his oral argument at the hearing on the motion for a temporary restraining order held August 8, after the revocation order had taken effect, the attorney for Local 28 stated that "we feel that we can establish by the evidence" some collusion between the IP and NECA. Thereupon the District Court queried, "Have you alleged that?" and Local 28's attorney responded, "No, as yet we haven't. • • • *Since that time* [the revocation hearing] many things, many important things have come to us that we feel that if given an opportunity to show the Court that there was coercion [sic] between International and NECA in order to destroy the Local union or to drive us before the Council on Industrial Relations" (Jt. App. 833-4). And later in that hearing, the Court said to Local 28's counsel, "• • • but I am not going to continue a preliminary injunction *while you hunt for grounds.* • • • I want to give you every opportunity to develop your case • • • and to give you such discovery or anything else that would aid you in doing it, but I can't hold them down by an injunction while you go fishing" (Jt. App. 838-9).

2. Again strong invidious implications on pp. 3 and 18 of

the petition, to the effect that IBEW's long established policy in favor of including the "evergreen" Council clause in the collective bargaining agreements of its locals was kept "secret" from the locals, are not true. On the contrary, "evergreen" Council clauses were contained in model agreements for IBEW locals and NECA chapters issued as early as September 15, 1931 (DX 70, Jt. App. 929-30). Furthermore, the 1958 International Convention turned down an attempt to leave it to the locals to decide whether or not they should use the services of the Council (Jt. App. 727) and, similarly, rejected an effort to amend the IBEW Constitution to nullify the IP's power to determine and enforce these "policies of the IBEW" (Jt. App. 724-5). The District Court found " it was *generally*, but not universally, *believed* that such agreements [the usual collective bargaining agreements] were 'evergreen' contracts, i.e. perpetual agreements terminable only by mutual agreement, by permission of the Council, or by the possible dissolution of the Council by IBEW and NECA" (Jt. App. 16-17). This statement was based upon a *concessum* by Local 28's counsel that "*everyone* apparently thought until your Honor's case • • • that the old form of Council clause was really an evergreen contract • • •" (Jt. App. 334).

3. Petitioners' statement on p. 26 of the petition that the 10c wage increase recommended in the so-called "tentative decision" of the Council on May 15, 1961, was an "unreasonably low wage increase beyond which Freeman would not support the Local" is wrong in two particulars. There is no evidence that the IP would not support the local for a higher wage. Again, a wage increase of 10c at that time was not unreasonably low,[25] but compares favorably with the increases of 15c, 17½c and 10c granted Local 28 in 1958, 1959 and 1960 (App. 15), which the District Court found to be "not unfair or unreasonable under all the circumstances, including the wage rates of comparable building trades in Baltimore, where unions are not as strong as in Philadelphia, Wilmington and Washington" (Jt. App. 20).

[25] Local 28's journeymen were at that time earning $3.85 per hour (Jt. App. 690). A ten cent raise would have put their wages in line with plumbers, steamfitters and sheet metal workers new rates for 1961.

It was also established in the case that the wage rate increases "for comparable building trades in Baltimore" were, for plumbers and steamfitters, 10c in 1960, 12c in 1961, and 13c in 1962, and for sheetmetal workers, 10c in 1960, 10c in 1961, and 15c in 1962 (Jt. App. 927-8). It should be realized also that this tentative recommendation for a 10c increase carried with it a recommendation omitting for Local 28 the "evergreen" Council clause.

4. Another outrageous mis-statement occurs on p. 27 of the petition to the effect that the District Court stated that the IP was "in league with the wolves" in the establishment of Local 24. Here the reference given (Jt. App. 593) clearly shows that the District Court, in colloquy, was merely posing a rhetorical "question", i.e. "whether Freeman was acting as a good shepherd or whether he was in league with the wolves".

5. Another glaring error in the petition is the statement on p. 34 that damages to Local 28, by reason of the revocation of its charter, "were stipulated to amount to $50,-662.64". The record reference which petitioners give for that statement is Jt. App. 714. Reference to that citation shows that the figure was stipulated to be merely "losses in assessments of Local 28 from June 1961-December 1961 as compared with the assessments collected in the same period in previous years". Obviously, this is no stipulation that there were any *damages occasioned by the revocation order* effective August 7, 1961. On the contrary, quite clearly, Local 28's drop in assessments (which are only paid to it out of wages earned when men are working) during the strike period, June-December 1961, as compared with previous years is attributable to Local 28's members refusing to work during the period July to December, 1961, because Local 28's unauthorized strike was in progress.

The Court of Appeals Decision

For lack of space we shall not labor the factual findings of the Court of Appeals. That Court accepted the evidentiary findings of the District Court, heretofore quoted. But it quite properly rejected that Court's *non sequiturs*, and

merely drew the correct and inescapable conclusions from the basic facts so found.

The heart of its decision lies in the following quotations from its opinion:

"While clearly correct in its recognition of the theoretical basis for judicial intervention, we think that the court [below] *erred in applying these principles* to the facts it had found." (App. 33).

"The refusal to sanction the June strike cannot be said to be a breach of a fiduciary duty owed the plaintiffs under the Constitution. If the IP believed that an appropriate Council clause could be negotiated and that Local 28 was excessive in its demands and 'shooting for the moon,' it was his prerogative to restrain the Local, and if possible to counteract its headstrong determination to wage a strike that could adversely affect the cause of his international organization. His duty was to 750,000 members, not merely a few who might gain a short-range advantage that could prove costly to the parent body, the employers, the public and, in the long run, to the plaintiffs themselves" (App. 35-36).

"Here it was not misconduct or a violation of fiduciary obligation for the IP to press for the reference of all unresolved bargaining issues between the Local and the Maryland Chapter to the Council for final solution. * * * *If this International insists that its locals shall complete the collective bargaining process before the Council*, composed equally of representatives of the International Union and of the Employer Association, *such insistence is certainly not illegal*" [26] (App. 42, 46).

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[26] "* * * the basic policy of national labor legislation [is] to promote the arbitral process as a substitute for economic warfare". *Teamsters Local* v. *Lucas Flour Co.*, 363 U.S. 95, 105. See also, *Textile Workers* v. *Lincoln Mills*, 343 U.S. 448, 455; *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 581. And see 29 U.S.C. § 171(a)(b) (Appendix to this brief, p. 1). The bricklayers, tile and terrazzo workers, painters, plumbers, pipefitters, and the seven basic trades, among others, utilize extension of collective bargaining at a national level to arbitrate disputes which cannot be resolved on a local level (Jt. App. 492-97). The same system is common in Great Britain and Western Europe (Jt. App. 497).

The AFL-CIO in its Amicus Brief filed in the Fourth Circuit emphasized the important public policy considerations which support the IBEW'S participation in the Council on Industrial Relations.

"What has been granted the parent body as its proper province in collective bargaining and what has been retained by the local—perhaps it is more accurate to put it the other way: what has been retained by the parent and what has been granted to the subordinate—is a matter of internal government *resting upon the contract* the local and its members have made in accepting a charter from the parent. * * * in the absence of specific legislation,[27] it does not lie within the authority of a court to give effect to its general preferences between international power and local autonomy in matters of collective bargaining" (App. 37).

"We do not agree that, on the facts in this case as established in the [lower] court's findings, there was a procedural defect in the trial before the IP[28] justifying a court

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[27] Legislative history makes it crystal clear that Congress intended to impose no restriction upon an international's participation in the collective bargaining process. The Court of Appeals in an *addendum* to its opinion (see Appendix to this brief, p. 3) said that it is "noteworthy that in the initial drafts of the bills that became the Taft-Hartley Act (LMRA), provisions were included in both Houses that would have either prohibited industry-wide bargaining or explicitly guaranteed to local unions the right to conduct their own collective bargaining entirely free from international interference. There was extensive debate on these proposals. * * * Consequently no such restrictive provisions were enacted. See references under 'Industry-wide Bargaining,' in the Topical Index to the *Legislative History of the LMRA* at p. XXXVI."

[28] Legislative history of Sec. 101(a)(5) of the Landrum-Griffin Act makes it crystal clear that Congress did not intend to require an impartial tribunal for intra-union disciplinary hearings. An express provision requiring such an impartial tribunal was considered by Congress *and rejected*. Thus, the McClellan Bill (S. 1137) and the McClellan Amendment to the Kennedy-Ervin Bill (S. 1555), as well as the Kearns Bill (H. R. 7265), each provided that union disciplinary procedural requirements must include, *inter alia*, the opportunity for "*final review* on a written transcript of the hearing, by an *impartial person or persons*", agreed upon by the union and the accused, or "designated by an independent arbitration or mediation association or board". Legis. His. LMRDA at 270, 605; 2 Id. at 1102. This provision was *deleted* by the Kuchel Substitute in the Senate and the Landrum-Griffin Bill in the House. 2 Ibid. at 1220, 1232, 1694. And see Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851, 872-75 (1960).

In the case at bar the facts were found after a 4-day hearing by a referee whom the District Court held to be "fair and impartial" (App. 50). The action of the IP thereon was affirmed by the IEC, which the District Court held to be "unbiased" (App. 33). In addition, the IEC, on new and additional evidence laid before it by Local 28, expressly upheld the propriety of the IP's conduct of the hearing (Jt. App. 803). In all three hearings petitioners were permitted the unusual privilege of being represented by legal counsel.

of law to interfere with and to overturn the action taken" (App. 49).

"Although the charge was defiance of the orders that the IP had issued, *his actions* in issuing the orders and in their vindication *were official not personal.* * * * it cannot be said that in ordering charges to be brought he was acting to vindicate a personal affront rather than the interest of the Union" (App. 50-1).

"Accepting this finding of some relation between the earlier suits and the IP's actions, we think it *may not be given controlling significance over the array of valid and legitimate motives shown* and the court's unequivocal finding absolving the IP from 'express or particular malice, i.e. ill-will, spite, a grudge, or a desire to be revenged on a particular person or persons, resulting in a deliberate intention to commit an injury.' 203 F.Supp. at 309. It would be a distortion of the record to elevate this factor to a position of pre-eminence, blotting out the permissible reasons for revocation of the charter" (App. 47).

"That the reasons given by the IP for the revocation here are not shams is amply established by the District Court's reservation of the International's right to retry the leaders of Local 28" (App. 48).

"We are of the opinion that, in this industry where there is admittedly close rapport between employers and the union and relatively free mobility between the employer and the employee categories, the activities shown to have occurred during the formation of the new Local [Local 24] cannot be said to have breached a fiduciary obligation owed by the International to the existing Local and its members" (App. 41).

The dissenting opinion

It is submitted that nothing in Circuit Judge Soper's dissenting opinion should tempt this Court to undertake further review of this case. The so-called "narrative" in this brief dissent (App. 78-82) contains at least 14 egregious errors of fact. They make up most of his opinion. They are

not based on "undisputed evidence", as the dissenting Judge claimed; they are not supported by the record; and none of them was even found as facts by the District Court. We must say most respectfully that they disclose no study of, or real acquaintanceship with, the over-1200 printed pages of record, briefs, and District Court opinion. These 14 erroneous statements in the dissent (App. 78-82) are quoted below in italics, with a brief refutation following each of them:

1. *The IP was 'determined to have his own way • • • in those areas in which the local union members were entitled to some freedom of choice".*

(The IP was properly "determined to have his own way" only in having Local 28 (a) end the unjustified and unauthorized strike, and (b) submit those disputes with employers which could not be resolved by collective bargaining at the local level to the Council on Industrial Relations for continued collective bargaining there. Both of these objectives were required by long established IBEW policies. Under the IBEW Constitution these policies were expressly in the IP's province, and not in any area in which the Local had "freedom of choice".)

2. *• • • the Local had much provocation from the IP himself when it ventured to strike without his consent".*

(There is not a scintilla of evidence to support this statement. The IP had made no statement to Local 28, and had taken no relevant action known to Local 28, before Local 28's April 1961 strike or before its June 1961 strike, both of which strikes were without the IP's consent. Local 28 itself has never argued until now that there was any provocation emanating from IBEW for its strikes.)

3. *The "demand of the workers for an increase in wages of 35 cents an hour [was] in place of an increase of 2 cents an hour offered by NECA • • •."*

The initial March 1 wage increase offer by the employers was 2c an hour for 1961 and 2c more for 1962 (Jt. App. 675), but during the collective bargaining, the employers, in five successive stages, increased their

offers until in June, at the time of Local 28's unauthorized strike it was 20c in 1961, 10c more in 1962 and 10c more in 1963 (Jt. App. 538, 539, 920). The District Court found that this final offer "amounted approximately to the same amount of money" as the increased wages obtained by Local 24 in the fall of 1961. If Local 28 had accepted this offer, its wage rate for journeymen today would be $4.25 cents per hour. (Jt. App. 690, 930). During the collective bargaining period Local 28 never deviated from its inflexible demand for an uneconomic increase of 35c which was impossible of attainment. This demand, in all fairness, is to be compared with 20c, not with 2c—which is just 1000% wrong.)

4. *"In this dispute* [*i.e. "for an increase in wages of 35 cents" and "in opposition to the insertion of a 'council clause'"*], *the IP promised the Local his support* • • •."

(The District Court merely found that Local 28 "reasonably felt that it had the support of the International in its efforts *to obtain a substantial increase*" (Jt. App. 20). Never once did the IP, or anyone on his behalf promise support for the Local's "moon-shooting" 35c demand, or intimate, until the conditional revocation order was issued, that this Local might be excused from the IBEW established "policy" for the "Council clause". Indeed, the District Court criticized the IP for not doing the latter (Jt. App. 28).)

5. *"In this dispute* • • • *he* [*the IP*] *in fact worked in harmony with NECA".*

6. *The IP "knew that he had opposed the working employees and favored NECA in the negotiations that preceded the strike."*

(These statements are no doubt intended to describe (a) the IP's statement to NECA in May that "he would do everything he could to see that the Local submit to the Council all issues regarding the terms and provisons of a new contract which could not be resolved by bargaining between the Local and the Maryland Chapter" (Jt. App. 24); and (b) the IP's statement to NECA, in June, *after Local 28's unauthorized strike*, that "he would assist the NECA contractors to obtain union employees" (Jt. App. 27). These obviously

normal and proper statements do not deserve the dissenting Judge's aspersions.)

7. *The IP "tried hard to persuade the Local to adopt the obnoxious clause [the so-called 'evergreen' Council clause] • • •"*

(The findings of the District Court were merely that the IP stated to Local 28's officers "that he wanted any *unresolved issues* to be submitted to the Council" (Jt. App. 26), and "the only way Local 28 could avoid disciplinary proceedings would be to return its members to work and submit all unresolved issues to the Council. He refused to give the Local any assurance that it would not be forced to accept the 'yellow sheet' clause but did not tell of the policy of the Council with respect to that clause" (Jt. App. 28). Never once did he try, "hard" or otherwise, *to persuade* Local 28 to adopt the "evergreen" Council clause.)

8. *The IP "tried hard to persuade the Local • • • to accept a raise of 10c an hour recommended by the IEC • • •."*

(The "IEC" (International Executive Council) made no wage raise recommendation whatever. The CIR (Council on Industrial Relations), so the District Court found, came to a "tentative decision" on May 15 awarding a 10c raise to Local 28 but eliminating any "evergreen" Council clause from its new contract. The IP never once recommended, much less tried hard to persuade it to accept, its suggested raise, or any other wage raise whatever. Furthermore, if there was this so-called "tentative decision", it was kept *confidential* and was never revealed to the Baltimore employers *or even to Local 28* (App. 21).)

9. *The IP "tried hard" to do (7) and (8) "although he was aware that the Local had obtained contracts with a number of independent contractors entitling the workers to an increase in wages of 35c per hour".*

(This statement omits the essential feature that these interim contracts *only conditionally* entitled the workers to an increase of 35c. The District Court clearly found that the interim contracts required the Local "to reimburse the contractors for the differences between the 35c an hour paid under the contract and the wage

ultimately agreed upon by the Local and the Maryland Chapter" (Jt. App. 26).)

10. *"The IP was angry with the union because it would not do his bidding* * * *."*

(The District Court found two instances of the IP's "anger", (a) at the Council meeting in May, because Local 28 failed to attend, although its collective bargaining agreement, and the well-known "policy" of the IBEW, required it to do so; and (b) when the IP revoked Local 28's charter in August 1961 because of some suits which 6 or 7 members of Local 28 had instituted years before, none of which had been tried and and none of which even named the IP as a defendant. The District Court in its decision gave no weight whatever to supposed "anger (a)". It erroneously gave controlling weight to the different, supposed "anger (b)". In neither case had the IP given Local 28 a "bidding.")

11. *The IP "knew* * * *that his own conduct was one of the matters that should be taken into consideration in deciding the case."*

12. *"Indeed, he [the IP] was aware that he ought not to sit in the case* * * *."*

(On the contrary, no question of the IP's conduct or good faith was ever raised by Local 28 until during the argument before the IP on July 28, 1961, weeks after the revocation hearing before the referee and his findings, and three days before the revocation order (Jt. App. 255). It is significant that the complaint filed by Local 28 against the IBEW on July 17, 1961, contained no allegations whatever that the IP was not acting in good faith. It is idle for petitioners to argue (petition p. 3) that Local 28's defense in the revocation proceedings *before the IP* "was based on the impropriety of his own conduct in the matter out of which the charges arose".

13. *"The appeal was taken in this case to the IEC but, as the District Judge pointed out in his opnion, the IEC* * * *[decided the case] upon the record made up by the IP."*

(The District Court "pointed out" no such thing. On the contrary, it found that Local 28's attorney at the

hearing before the IEC "was allowed to read from the depositions of the IP and other witnesses which had been taken for use in the *Parks* case and to challenge the good faith and impartiality of the IP and the members of the IEC in the course of his intemperate and ill-advised argument" (Jt. App. 36). There was no record "made up by the IP", and the record of the proceedings before him could not have included these depositions of the IP and others, which were taken by Local 28 *after* the revocation order. That record could not have included any material bearing upon the IP's conduct and good faith, because Local 28 had made no issue thereof until its argument before the IP on July 28, after that record was closed. Yet the IEC was requested, on the strength of those depositions, to review that question; and it did so, holding expressly "that the International President conducted himself properly is *beyond question*" (Jt. App. 803).)

14. *"This was the only case in which the IP had refused his consent to a strike by a Local union when it desired to strike in order to maintain its position in a legitimate labor dispute."*

(On the contrary, the District Court necessarily found expressly that "Other locals had engaged in strikes without prior consent of the IP" (Jt. App. 28-9). The Court also pointed out, "*Plaintiffs* argue * * * that other locals had engaged in unauthorized strikes * * *" (Jt. App. 37). The record contained numerous instances in which the IP had expressly refused his consent to strikes by other locals (Jt. App. 120, 122, 124). The IP testified to 15 or 20 unauthorized strikes in the past six years (Jt. App. 232) and perhaps a dozen unauthorized strikes at missile bases (Jt. App. 235-6). The important thing is that in all these instances, except for Local 28's unprecedented continued massive defiance, the local either obtained IP consent or returned to work as ordered (Jt. App. 125). The IP testified "I should like to tell the Court that this is the first time to my knowledge that a local union has refused to comply with the Constitution and instructions of the International Office" (Jt. App. 232). The Court of Appeals found, "there is apparently no precedent for the obdurate persistence of this Local after ample warnings" (App. 37).)

REASONS FOR DENYING THE WRIT

Since there was complete agreement between the Court of Appeals and the District Court as to (a) the law, and (b) as to the basic facts, we submit that the petition should be denied under the well-settled "two-court rule". See the host of decisions collected in Robertson and Kirkham, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES (1951), at p. 659, footnote 7. See also Stern and Gressman, SUPREME COURT PRACTICE (3rd. ed.) Sec. 4-14.

The petition utterly fails to establish the existence of any of the usual grounds enumerated in Rule 19 for moving this Court to grant a writ of certiorari at the instance of petitioners.

There is no showing that the Fourth Circuit's decision is in conflict with the decision of any other Court of Appeals on the same matter.

There is no showing that the Fourth Circuit decided against petitioners an important question of Federal law which has not been, but should be, settled by this Court.

There is no showing that the Fourth Circuit, on the merits, decided a Federal question in any way in conflict with applicable decisions of this Court.

Nor is there any showing that the Fourth Circuit in this case has departed from the accepted and usual course of judicial proceedings, as to permit petitioners to invoke an exercise of this Court's power of supervision. Petitioners' real objection is that they do not agree with some of the ultimate factual conclusions of the Fourth Circuit based directly and inevitably upon detailed findings of the District Court, which both petitioners and Court of Appeals have accepted and which petitioners do not challenge here. Although they have attempted in their petition to deck some of these objections out as legal questions, the effort is disingenuous. The legal questions they suggest for review are only those decided in their favor.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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